(36) (38)

Nos. 01-1118, 01-1119

Supreme Court, U.S.
FILED
OCT 18 2001
CLERK

In the Supreme Court of the United States

JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, AND THE PRO-LIFE ACTION LEAGUE, INC.,

Petitioners,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

OPERATION RESCUE,

Petitioner,

v.

NATIONAL ORGANIZATION FOR WOMEN, INC., ET AL.,

Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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REPLY BRIEF OF PETITIONERS JOSEPH SCHEIDLER, ANDREW SCHOLBERG, TIMOTHY MURPHY, AND THE PRO-LIFE ACTION LEAGUE, INC.

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Respondents open their brief with a long jury speech consisting of a highly selective account of disputed evidence presented at this contentious trial. The assumption underlying this recitation is that every single bad act over the course of 15 years of anti-abortion protests that was referred to at trial was perpetrated by a "PLAN member." Even if that were true (and it is not), and even if these incidents happened the way respondents portray them (and they did not), the critical point is that there is no basis whatsoever for concluding that the *jury credited or relied* on respondents' litany.

The jury in this case found that *only four* "[a]cts or *threats* of physical violence" to a "person *or property*" had occurred. J.A. 144 (emphasis added). There is no way of knowing, because respondents vigorously opposed greater specificity in the jury's findings, whether those four unidentified incidents by unidentified protesters involved acts of violence against people or only threats of violence against "property" (broadly defined as "*anything* of value" (J.A. 136) (emphasis added)). The remaining "crimes" that respondents repeatedly cite – which, according to the jury's findings, did *not* involve acts or even threats of physical violence – consisted of "extortion" as that offense was sweepingly defined in the jury instructions. In any event, this case is *not* about the conflicting evidence presented at trial; it is about the proper legal definition of extortion under the Hobbs Act and the availability of injunctive remedies in private civil actions under RICO. On those *legal* issues, respondents have nothing persuasive to say.

I. THE HOBBS ACT DOES NOT PUNISH EVERY INTERFERENCE WITH CONTRACTUAL RIGHTS OR THE RIGHT TO CONTROL PROPERTY

In our opening brief (at 10-18), we explained that the Seventh Circuit's broad definition of extortion is inconsistent with the text, structure, and legislative history of the Hobbs Act and its predecessor, the Federal Anti-Racketeering Act of 1934. In effect, the lower courts transformed extortion into the far broader, but less serious, crime of *coercion* – even though there

is clear evidence that Congress, in passing the Hobbs Act, elected *not* to punish coercion. See 0-1118 Pet. Br. 23-24, 29-32. And the Seventh Circuit's analysis represents a vast departure from the settled meaning of a term of art – the "*obtaining* of *property from another*" – contained in the Field Code of 1865 and carried forward in the New York extortion statutes on which the Hobbs Act was modeled. See *id.* at 18-28.

Strikingly, respondents make no effort to defend the *actual holding* of the Seventh Circuit or the language of the jury instructions. Instead, respondents have come up with new definitions: the "property" of the clinics – defined as the "right * * * to provide medical services" in the jury instructions (J.A. 136) and the "right to conduct a business" in the Seventh Circuit's opinion (01-1118 Pet. App. 29a) – has now been transformed into a right to "direct the use and disposition" of "the tangible physical assets of a clinic." Resp. Br. 10. The "property" of the putative patients – defined as "a woman's right to seek services from a clinic" in both the instructions and the opinion – now makes its debut as a right "to the benefits of * * * fee-for-service contracts with medical providers." *Id.* at 12. And the concept of "obtaining" – defined as causing someone to "give up" a "property right" in the instructions and even more broadly in the Seventh Circuit's opinion as any "loss to, *or interference with* the rights of, the victim" – has now been repackaged as wresting "control over the use and disposition of an asset." Resp. Br. 24. As we explain below, respondents' newly minted formulations – which cannot salvage a judgment predicated on different legal definitions – are erroneous.

A. Respondents' Definition Of Extortion Is Inconsistent With The Text, Structure, And Legislative History Of The Hobbs Act

Respondents argue (at 12) that petitioners committed extortion by "overrid[ing] the clinics' lawful decisions about use of their business assets, including buildings, equipment, and personnel, and the patients' rights to the benefits of their fee-for-service contracts with medical providers." This argument proceeds in three steps. First, respondents equate "property" with

"property rights" by resorting to the modern analogy of property as a "bundle of sticks." See Resp. Br. 14-18; see also U.S. Br. 16-17 (arguing that "the right to control and use property *is itself* property") (emphasis added). Relatedly, respondents also say that all "rights created by contract" are "property." Resp. Br. 16. Second, respondents contend (invoking Blackstone) that the right to exclusive "control" over the "use, enjoyment, or disposal" of property is "[a]t the center of the bundle." *Id.* at 16, 17, 19; see also U.S. Br. 16, 18-19. And third, they argue that preventing someone else from exercising this right to control (or a contractual right) is tantamount to "obtaining" that right. Resp. Br. 24-29. This argument is flawed at every turn.

1. a. To begin with, "property" within the meaning of the Hobbs Act is simply not the same as any "right" or "interest" in property. As explained in our opening brief (at 13-14), Congress knows how to reach deprivations of, or interference with, "property rights" but has not done so in the Hobbs Act. Indeed, certain of the cases cited by respondents expressly distinguish between "property" and a "right in property," the very distinction respondents deny.[1]

Equally important, respondents' use of the "bundle of sticks" paradigm is fundamentally anachronistic. It was not until 1913 and 1917 that Wesley Hohfeld published his seminal

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[1] *E.g.*, *United States* v. *Craft*, 122 S. Ct. 1414, 1422 (2002). Most of the "property" cases cited by respondent (at 14-17) and the government (at 15-16) address the meaning of that term in federal tax law or under the Takings or Due Process Clauses of the Constitution. Of course, where the government's taxation power is concerned, property is given its broadest possible meaning. See *Craft*, 122 S. Ct. at 1422-23. And, when interpreting the scope of constitutional rights, the Court's jurisprudence has been known to "evolve[]." *Ford* v. *Wainwright*, 477 U.S. 399, 405 (1986). But where a federal *crime* is involved, the federal courts are not free to implement their own "evolving" concepts of "property." See *United States* v. *Hudson and Goodwin*, 11 U.S. 32, 33 (1812) (no federal common law of crimes). And where Congress has incorporated common law concepts or terms of art in a criminal statute – such as "extortion" and "obtaining of property from another" – courts must give those terms their traditional meaning. See *Evans* v. *United States*, 504 U.S. 255, 264 (1992).

articles reconceptualizing property as a "complex aggregate of rights, privileges, powers, and immunities against other persons" (Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 361 (1980)) – a conception later adopted in the RESTATEMENT OF PROPERTY (1936). The models used by Congress for the Hobbs Act – the Field Code of 1865 and the New York Penal Codes of 1881 and 1909 – all predate these developments. These models therefore cannot be analyzed using the "bundle of sticks" metaphor, which is predicated on Hohfeld's theory. See Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 712-14 (1996).

Respondents insist (at 13), however, that "property" must be treated as a "deliberately inclusive" term, citing *Stirone* v. *United States*, 361 U.S. 212 (1960). But this Court's recognition in *Stirone* of the Hobbs Act's "broad language" (*id.* at 215) was a specific reference to the Act's coverage of robberies and extortions that "in any way or degree" (18 U.S.C. § 1951(a)) interfere with interstate commerce. See 361 U.S. at 215. Contrary to respondents' suggestion (at 13), *Stirone* does not hold that every word in the Hobbs Act is to be broadly construed (an approach that would violate the rule of lenity). In fact, as we demonstrate in our opening brief (at 31-32), the legislative history shows that Congress intended to limit "extortion" to its traditional definition under New York law – a limitation regarded as necessary to protect the rights of labor.

Respondents also maintain (at 15 n.16) that "property" includes the patients' contractual right to "exchange money for medical services." There was of course no showing below (or any requirement of a showing) that the members of the patient class had any such "contracts." As we explained in our opening brief (at 25-26), the notion that contract rights are "property" under the Hobbs Act is contrary to New York law. See also *id.* at 16-17.[2] Equally important, if accepted it would convert the

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[2] Respondents' authority for the proposition that "property" under the Hobbs Act includes contract rights (see Resp. Br. 16 n.17) includes only one Hobbs

state-law torts of interference with contractual relations and prospective advantage into federal crimes under the Hobbs Act.[3]

b. Next, respondents selectively invoke Blackstone for the proposition that the right to "control" over the "use, enjoyment, or disposal" of property is "[a]t the center of the bundle." Resp. Br. 16. Because Blackstone's concept of property was limited to *physical things*, however, respondents would necessarily lose this case if the Hobbs Act embodies Blackstone's general definition of property.[4] And, of course, respondents ignore Blackstone's more specific discussion of the narrower concept of "property" in criminal law, including under the crime of extortion. See 4 W. BLACKSTONE, COMMENTARIES 141 (17th ed. 1830) (extortion requires obtaining of "any money or *thing* of value") (emphasis added).

c. Even if one accepts the premise that the right to exclusive control of property and contract rights are "property," there is no basis for concluding that petitioners *obtained* from the respondent clinics (or the patients) the right to "control the use" of clinic assets (or the contractual right to purchase services). At most, respondents *interfered with* the clinics' right

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Act decision, *Northeast Women's Center, Inc.* v. *McMonagle*, 868 F.2d 1342, 1350 & n.8 (3d Cir. 1989), another abortion protest case that discussed this issue only in passing and cited no authority. Respondents also cite (at 16 n.17) a Second Circuit case involving mail fraud, but they neglect to cite this Court's contrary decision in *Carpenter*. See 01-1118 Pet. Br. 16-17.

[3] The Solicitor General pointedly refrains from addressing the "property" theories charged to the jury relating to the interests of the physicians and patients (as opposed to the clinics). See U.S. Br. 15 n.6. The lower court's opinion, however, specifically identifies all three theories of extortion and rejects petitioners' challenge to all three, explaining that the Seventh Circuit had previously held that "intangible property *such as* the right to conduct a business" is "property." 01-1118 Pet. App. 29a (emphasis added).

[4] Blackstone defined property as the "*sole and despotic dominion* which one man claims and exercises over *the external things of the world*, in total exclusion of the right of any other individual in the universe." 2 W. BLACKSTONE, COMMENTARIES 2 (17th ed. 1830) (emphasis added); see also Vandevelde, 29 BUFF. L. REV. at 330-33 (discussing "physicalist" and "absolutist" features of Blackstone's general theory of property).

of control or *temporarily thwarted its exercise* (during the pendency of the sit-ins). Nor did petitioners obtain the patients' alleged contractual rights. Of course, petitioners do not have these rights today (which is rather difficult to square with respondents' suggestion that petitioners have "obtained" them). To suggest that an interference of this kind is tantamount to "obtaining" obliterates the distinction between those concepts.

2. Respondents downplay several important aspects of the Hobbs Act that highlight the broad reach and ramifications of their proposed definition of extortion.

First, respondents (and their *amici*) largely ignore the fact that extortion under the Hobbs Act extends to the wrongful "obtaining of property from another" by inducing the victim to consent not only though "force" or "violence" but also through "fear" – a broad term that, under the jury charge, included "fear of wrongful *economic* injury." J.A. 136 (emphasis added).[5] For all we know, the jury's determination that petitioners committed extortion relied on a finding that their sit-ins and political protests had engendered a fear of "wrongful economic injury."

As Operation Rescue explained in its opening brief (at 43-44), it is doubtful that Congress intended to criminalize sit-ins and other political protests as extortion when it used the phrase "force, violence, or fear." It is certainly possible to read that phrase as including only physical force, violence, and fear of either physical force or violence. But as noted in our opening brief (at 22 n.16), New York extortion law defines "fear" in sweeping fashion to include fear of adverse economic consequences in a very broad sense.[6] The Court's analysis of the

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[5] Respondents go so far as to rewrite the question presented to omit the word "fear." See Resp. Br. i (referring to use of "violence and threats of violence").

[6] Congress, of course, did not incorporate into the Hobbs Act the broad definition of "fear" contained in the New York statute (see 01-1118 Pet. Br. 3a). But that broad concept has been accepted by many federal courts, see Rutherford *Amicus* Br. 13-17, and was reflected in the jury instructions in this case. If "force, violence or fear" is limited to physical force, violence, and fear of either physical force or violence, then the Hobbs Act instructions in

remainder of the definition of extortion must take this feature into account.[7] Thus, if the Solicitor General is correct that causing a "business to cede control over what goods or services [it] will offer" (U.S. Br. 24) qualifies as the "obtaining of property from another," then doing so by engendering a reasonable fear of economic harm is now punishable by 20 years in prison.

Second, respondents do their best to ignore the serious federalism implications of their position for the closely related crime of *official* extortion. Both crimes prohibit the "obtaining of property from another," and neither respondents nor the government suggests that this language carries a different meaning under the two offenses. See U.S. Br. 20 (admitting that prosecutions for official extortion "typically involved the receipt of money").[8] But if respondents' interpretation of the Hobbs Act is correct, then official extortion would be expanded to cover any interference with the "control over the use and disposition of an asset" (Resp. Br. 24) done under color of official right. This would bring within the ambit of the Hobbs Act a vast array of official conduct that has traditionally fallen outside the purview of official extortion. See Alabama *Amicus* Br. 10-12.

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this case were erroneous and the judgment must be reversed.

[7] The government insists (at 24) that extortion can be committed even if the defendant does not have "a profit-making objective." At common law, however, the intent to wrongfully *acquire* the victim's property, known as *animus furandi*, was an indispensable element of all theft crimes, including extortion. See *People* v. *Vidaver*, 112 N.Y.S. 606, 606 (Gen. Sess. 1908) (indictment charging attempted extortion must include allegation of threat "made with intent to wrongfully obtain property from the [victim]"); *United States* v. *Enmons*, 410 U.S. 396, 406 n.16 (1973) ("[E]xtortion requires an intent to obtain that which * * * the party is not entitled to receive.") (internal quotation omitted); see also U.S. Br. 29 n.16 (conceding that "intent to steal" is an essential element of robbery).

[8] The government notes (at 21) that in passing the Hobbs Act, Congress expanded the common law definition of extortion to include acts by private individuals. It does not follow, however, that Congress intended to expand the definition of "property" in both official and private extortion. U.S. Br. 21. As explained in our opening brief (at 18-19, 28-32), the legislative history of the Hobbs Act shows otherwise.

3. As we showed in our opening brief (at 28-32), Congress, in passing the Hobbs Act and the 1934 Act, intended to *exclude* conduct that would constitute the separate, and much less serious, crime of coercion. Congress had before it the New York definitions of both extortion and coercion when it considered both pieces of legislation, and was acutely aware of the difference between the two offenses. 01-1118 Pet. Br. 29-31 & n.23. Respondents' broad reading of extortion subsumes conduct that New York law punished only as coercion in 1946, in direct contravention of Congress's intent.

Respondents have nothing persuasive to say in response. They first suggest, inconsistently, that (1) "extortion is simply a subset of coercion that involves property" and (2) "coercion is a lesser included offense" of extortion. Br. 26 n.32. In fact, the crimes are distinct (see 01-1118 Pet. Br. 2a-3a); it is only respondents' sweeping definition of "the obtaining of property from another" that threatens to collapse the two crimes into one. Next, respondents (at 26 n.32) point to this Court's shorthand reference to "coercive extortion" in *Evans*. But we do not dispute that non-public extortion involves the use of wrongful *compulsion* (or coercive means) by the perpetrator. It does not follow, however, that the *crime* of coercion and the *crime* of extortion are the same (or even substantially overlapping).

B. Respondents' Definition Departs From The Traditional Meaning Of Extortion Under New York Law

Respondents acknowledge that Congress modeled the Hobbs Act after the New York Penal Codes of 1881 and 1909. Resp. Br. 18; accord U.S. Br. 17. This is fatal to their argument.

1. As explained in our opening brief (at 19-23), the Field Code of 1865 – and the New York Penal Codes of 1881 and 1909 that adopted and carried forward the Field Code's definition of "extortion" – meant something quite specific and limited when they referred to the "*obtaining* of *property from another*." Every extortion case we have found in New York or other jurisdictions prior to the Field Code's publication (and every case cited in the cross-referenced notes to the larceny provision) involved a defendant who *actually acquired* from the victim

"property" in a very narrow sense. The same is true of *every reported extortion case* decided between 1865 and 1946, when the Hobbs Act was passed, not only in New York (see 01-1118 Pet. Br. 24) but also in the 10 other States that modeled their extortion statutes after the Field Code. See 01-1118 Pet. Br. 27 n.21.[9] In addition, every reported *federal* case brought under the 1934 Act – which also punished the "obtain[ing of] the property of another" – involved an extortionist who sought *money* from a victim. *Id.* at 31 n.24.

Not until *1969* – more than a century after the Field Code and almost a quarter century after the Hobbs Act – did the New York and lower federal courts embark on a judicial expansion of the term of art "the obtaining of property from another." See 01-1118 Pet. Br. 26 n.20 (citing New York cases). The first federal decision to do so of which we are aware, *United States* v. *Tropiano*, 418 F.2d 1069, 1075-76 (2d Cir. 1969), cert. denied, 397 U.S. 1021 (1970), which is the fountainhead of all the later federal decisions, held that the "right to pursue a lawful business" and "to solicit customers" is "property" that can be obtained under the Hobbs Act. In reaching that result despite a "serious[] challenge[]" raised by the defendant (418 F.2d at 1069), the Second Circuit relied on three grounds: (1) the same misreading of *Stirone* advanced by respondents in this Court (see page 4, *supra*); (2) an uncritical reliance on prior Hobbs Act cases that had interpreted the distinct concept of "fear" (see page 10, *infra*); and (3) federal due process decisions recognizing a broad concept of "property." *Id.* at 1075-76.

Notably, the third basis for the decision in *Tropiano* has

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[9] Contrary to respondents' contention (at 21), *People* v. *Cadman*, 57 Cal. 562 (1881), did not "hold" that "the intangible right to pursue an appeal is property." As we noted in our opening brief (at 27 n.21), the California Supreme Court there simply "assum[ed]" for the purposes of the appeal that such a right might qualify as "property." 57 Cal. at 564. In addition, *Cadman* did not construe California's extortion statute modeled after the Field Code, CAL. PENAL CODE § 518, but rather Sections 519 and 523, which separately punished the sending of threatening letters. 57 Cal. at 563; see also *People* v. *Tonielli*, 22 P. 678, 679 (Cal. 1889).

been invalidated by this Court's decision *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999). There, the Court observed that while "[t]he assets of a business (including its goodwill) unquestionably are property[,] * * * business in the sense of *the activity of doing business*, or *the activity of making a profit* is not property in the ordinary sense." *Id.* at 675 (emphasis in original); see also *id.* at 674 (although the right to acquire property by honest labor and right to conduct a lawful business are to be *treated* as property in courts of equity, they are not *property*). Thus, it is far from clear that *Tropiano* remains good law.[10]

In any event, neither respondents nor the government explains why, if "the obtaining of property from another" means what they say it means, it took more than a century for federal and state prosecutors to discover that. "It is unlikely that if Congress had indeed wrought such a major expansion of federal criminal jurisdiction in enacting the Hobbs Act, its action would have so long passed unobserved." *United States* v. *Enmons*, 410 U.S. 396, 410 (1973); see also *McCormick* v. *United States*, 500 U.S. 257, 277 (1991) (Scalia, J., concurring).

Respondents and the government contend, however, that New York law *did* recognize a broader concept of "property" that was relevant to the crime of extortion. Resp. Br. 19-20 & n.23; U.S. Br. 17-18. But all of the cases they cite either were decided decades *after* the Hobbs Act was passed, or are distinguishable because they discuss the types of threatened "injur[ies]" to "person or property" that will give rise to "fear" within the meaning of N.Y. PENAL LAW § 851 (1909). The latter cases construe the word "property" in a very different context, however, as a close examination of Section 851 makes clear. See 01-1118 Pet. Br. 3a (setting out entire text of Section 851); see also *Smith* v. *United States*, 508 U.S. 223, 229 (1993)

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[10] No doubt because he recognizes this problem, the Solicitor General now attempts to recast *Tropiano* as involving "the exclusive right to control the conduct of [a] business's operations" rather than what the Second Circuit said it involved: the right "to pursue a lawful business" and "to solicit customers" (418 F.2d at 1076). See U.S. Br. 23; compare *id.* at 19.

(explaining that "[t]he meaning of a word" in a statute must be "analyzed in light of the terms that surround it").

Given the broad sweep of Section 851, which defines "fear" expansively to include any threat of exposure of a secret or some type of "disgrace," it would have been difficult to conclude that the New York legislature intended to limit the "person or property" that can be threatened with injury to those forms of property traditionally protected against wrongful acquisition. See *People* v. *Barondess*, 31 N.E. 240, 242 (N.Y. 1892) (explaining that "the section [*i.e.*, Section 851] has not employed the term in that manner"). Why would the legislature have intended to punish compelling a business owner to make a pay-off induced by a threat to reveal a secret but not a threat to shut down the business through a work stoppage? In either case, a pay-off was extorted by a wrongful inducement. Thus, the government is quite wrong in suggesting (at 18) that there was "no basis" for interpreting the word "property" in Section 850 differently from "person or property." Indeed, one New York court found such a basis. See *People* v. *Squillante*, 185 N.Y.S.2d 357, 361 (Sup. Ct. 1959).[11]

Moreover, the government's contention that "property" must have the same meaning everywhere it appears in a statute undermines its own reading of the Hobbs Act. Section 1951(a) punishes not only acts of "extortion" and "robbery" (and attempts and conspiracies to commit those offenses) but also acts or threats of "*physical violence* to any person or *property* in furtherance of a plan or purpose to do anything in violation of this section." 18 U.S.C. § 1951(a) (emphasis added). As used

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[11] Respondents (at 20 n.23) unfairly disparage *Squillante*, an opinion written by Justice Bernard S. Meyer (who went on to serve on the New York Court of Appeals in 1979-1986), as involving "tortured reasoning." Respondents (at 19-23 & n.23) and the government (at 18-19) rely heavily on *People* v. *Spatarella*, 34 N.Y.2d 157 (1974). But in that case, and in *People* v. *Wisch*, 296 N.Y.S.2d 882, 886 (Sup. Ct. 1969), New York courts – construing a later penal code enacted in 1965 – relied on the older cases involving the meaning of "fear" as defined in N.Y. PENAL LAW § 851 (1909), and did so without offering any analysis of Section 851 and without even citing *Squillante*.

in this residual clause of the Hobbs Act, "property" plainly connotes something tangible, since intangible property cannot be the subject of "physical violence." Thus, if this Court were to apply the government's canon of construction, the government's interpretation of the Hobbs Act (and respondents') would have to be rejected.[12]

2. Next, respondents say (at 13) that we fail to offer a "coherent theory of what property" includes. They are mistaken. To begin with, the historical definition we derive from the New York case law – "money, tangible things of value, or notes, bills, or other written documents entitling the holder to money or other tangible property" (Br. 19) – is hardly indeterminate. The fact that this definition does not feature a bright conceptual line (as between real and personal property) is a function of the common-law development of property-law crimes, which proceeded incrementally by expanding the protections of the criminal law to new forms of property. This Court has not hesitated to require the lower courts to engage in a historical inquiry of this kind where one is warranted. See *Great-West Life & Annuity Ins. Co.* v. *Knudsen*, 122 S. Ct. 708, 716-17 (2002). In the alternative, we also offer several definitions that draw upon limits recognized in New York law and expressed in the language of the Hobbs Act, such as the requirement that "property" at least be something that is transferable (and capable of being "obtained"). See 01-1118 Pet. Br. 14, 24-26. Respondents' attempt (at 17-18 & n.20) to counter that argument by citing non-New York cases and academic commentary that are far afield is wholly unpersuasive.

3. Respondents say (at 12) that our historical reading of the

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[12] As we noted in our opening brief (at 16-17, 34 n.27), the mail fraud statute reaches a larger category of "property" than does the Hobbs Act. The mail fraud statute refers to "any scheme or artifice to defraud, *or for obtaining money or property*" (18 U.S.C. § 1341 (emphasis added)). The latter phrase – which was added in an amendment – was intended to mirror the reach of the "scheme or artifice to defraud" language, which is far broader than the language of the Hobbs Act. See *Cleveland* v. *United States*, 531 U.S. 12, 19 (2000); *Carpenter* v. *United States*, 484 U.S. 19, 27 (1987).

Hobbs Act is "too circumscribed to achieve its obvious purposes," but as we have demonstrated (at 28, 30-31), Congress's purpose in enacting the Anti-Racketeering Act of 1934 and the Hobbs Act was in fact relatively narrow: to bring a halt to the "rackets" that were being used by gangsters and organized crime to extract payments and other "tribute" from businesses.[13]

4. Respondents warn (at 12-13) that if our reading of the Hobbs Act is accepted, "terrorists" who committed other state or federal crimes (such as conspiracy to kidnap, assault, criminal coercion) would no longer be punishable under Section 1951. The text and legislative history of the Hobbs Act make clear, however, that Congress never intended the statute to be the panacea respondents suggest. And, of course, there is nothing to prevent Congress from amending the Hobbs Act (or creating new crimes) if it wishes to add yet another layer of criminal proscriptions to those that already exist under other federal and state criminal laws.[14]

C. Respondents Are Wrong To Suggest That The Judgment Can Be Salvaged

As we have noted (01-1118 Pet. Br. 17 n.12), it is impossible to determine which predicate acts formed the basis for the

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[13] Despite their condemnation elsewhere of "foray[s] into legislative history" (Resp. Br. 43), respondents seize upon a reference made by a Member of Congress to the "night-riders" of Kentucky (*id.* at 18). The point of this statement, however, was that "crimes" such as "murder, rape, kidnaping, arson, theft, * * * robbery *and* extortion" are "not confined to racketeers in the labor movement." 91 CONG. REC. 11,906 (1945) (emphasis added). Nothing in this passing remark detracts from our showing (Br. 32 n.25) that the examples of *extortion* used throughout the legislative debates reflect the historical definition set forth in our opening brief.

[14] Similarly, *Amici* Former Federal Prosecutors *et al.* insist (at 21) that our reading of the Hobbs Act would have "grave implications for federal law enforcement" because it would "decriminalize" conduct that Congress has proscribed in eight other sections of Title 18. But only *one* of the cited statutes contains language similar to that of the Hobbs Act. See 18 U.S.C. § 2113(a). Nor have *amici* shown that Congress, in passing these other provisions, similarly drew upon New York extortion law circa 1946, which in turn borrowed its core concepts from the 1865 Field Code.

jury's RICO verdict, or for its determination of damages. It is possible, therefore, that the verdict was based on Hobbs Act violations that, as a matter of law, were not violations at all. Under this Court's well-settled precedent, the judgment must therefore be vacated. See *Maryland* v. *Baldwin*, 112 U.S. 490, 493 (1884); *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30 (1962). Notably, this principle necessitates a reversal of the entire verdict if *any* of the three theories of extortion charged to the jury was legally defective.

Respondents maintain otherwise, contending that "the jury's verdict would stand" (Br. 34) even if this Court determines that petitioners did not violate the Hobbs Act because the jury found that petitioners committed other predicate acts. In *Griffin* v. *United States*, 502 U.S. 46 (1991), this Court "affirmed a general verdict even though it may have rested on a prong of the instruction *as to which the evidence was insufficient.*" Resp. Br. 35 n.46 (emphasis added). But *Griffin* also reaffirmed the rule of *Yates* v. *United States*, 354 U.S. 298 (1957), which held that a general verdict that might have rested on *legal error* – and not insufficiency of the evidence – must be vacated. See *Griffin*, 502 U.S. at 56, 58-59. None of the lower court cases cited by respondents (at 34) is to the contrary. At a minimum, then, the judgment must be vacated.

II. RICO DOES NOT AUTHORIZE PRIVATE PLAINTIFFS TO SEEK INJUNCTIVE RELIEF

1. *The Antitrust Models for Section 1964(c).* Respondents do not deny what this Court has repeatedly recognized: Section 1964(c) was modeled on Section 4 of the Clayton Act, which in turn was modeled on Section 7 of the Sherman Act. 01-1118 Pet. Br. 37-38. Nor do they dispute that the relevant language of these three provisions is in every material respect identical. These antitrust models were clearly understood, when RICO was enacted, as *not* authorizing private injunctive relief.

Respondents nevertheless contend that the same language carries a different meaning in Section 1964(c) because of differences between the language of Section 1964(a) of RICO and the corresponding jurisdictional provisions of the Sherman Act (15

U.S.C. § 4) and the Clayton Act (15 U.S.C. § 25). See Resp. Br. 41-43. Specifically, respondents note that, whereas each of the antitrust provisions contains two components separated by a semicolon (the first vesting equitable jurisdiction in the district courts; the second authorizing the United States to "institute proceedings * * * to prevent and restrain * * * violations"), Congress elected in RICO to put those components into separate subsections (§§ 1964(a) and (b)). Although they describe this as a "key structural difference[]" (Resp. Br. 41), respondents identify no reason why the choice of a semicolon over a separate subsection heading should qualify as such, and it is difficult to imagine why it should. Accord U.S. Br. 11.

Respondents also make much of the fact that the Sherman and Clayton Act provisions state that "it shall be the *duty*" of the Attorney General to "institute proceedings in equity to prevent and restrain" violations (15 U.S.C. § 25(a) (emphasis added)), whereas Section 1964(b) states that the Attorney General "*may* institute proceedings under this section." 18 U.S.C. § 1964(b) (emphasis added). See Resp. Br. 42-43. But there is no real difference between those formulations; in both cases, the Attorney General is given the discretion ("duty") to institute injunctive proceedings if he chooses. Moreover, any conceivable difference in the Attorney General's enforcement discretion would shed no light on the very different question whether *private parties* are authorized to seek injunctive relief.

Nor have respondents accurately disputed our submission that, at the time RICO was enacted, this Court's decisions had clearly established that private injunctive relief was *not* authorized under the precursor Sherman Act provisions. Indeed, *Paine Lumber Co.* v. *Neal*, 244 U.S. 459 (1917), which respondents misread, see 01-1119 Merits Reply Br. 6-7, was decided over a dissent arguing – as respondents argue here – that "in the absence of some provision to the contrary, the right to relief by injunction * * * rests upon settled principles of equity." 244 U.S. at 473. Notably, respondents make no effort to explain the many other decisions of this Court identified by the Solicitor General (at 10 & n.4) that applied the holding of *Paine Lumber*.

Respondents fare no better in seeking to distinguish *Paine Lumber* on the ground that it predated "the merger of law and equity" in 1938. Resp. Br. 42; see also Motorola *Amicus* Br. 17-18. This Court has repeatedly reaffirmed the holding of that case – including post-merger. See *United States* v. *Cooper Corp.*, 312 U.S. 600, 608 & n.9 (1941). In any event, the merger of law and equity "did not alter substantive rights." *Grupo Mexicano* v. *Alliance Bond Fund, Inc.*, 527 U.S. 308, 322 (1999). It merely removed one (purely procedural) reason why Congress might have chosen to discuss equitable and legal remedies separately; it did not remove other, non-procedural reasons, such as the policy rationales animating Congress's decision to assign to the federal government the exclusive authority to seek injunctive relief under the Sherman Act (and RICO). See *Minnesota* v. *Northern Securities*, 194 U.S. 48, 70-71 (1904); *D.R. Wilder Mfg. Co.* v. *Corn Prods. Refining Co.*, 236 U.S. 165, 175-76 (1915); U.S. Br. 14-15.

Respondents point out that this Court occasionally has "rejected the antitrust analogy when analyzing RICO." Br. 43 (citing *Tafflin* v. *Levitt*, 493 U.S. 455 (1990), and *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985)). Those cases, however, are exceptions to the rule. See 01-1118 Pet. Br. 39. In *Sedima*, which relied on the antitrust analogy in resolving one issue but not another (473 U.S. at 489-90), there was strong evidence in RICO's legislative history that Congress "sought to avoid" problems that would arise if the specialized "body of precedent" dealing with antitrust standing were imported into RICO in the form of an analogous "racketeering injury" requirement. 473 U.S. at 498-99. In *Tafflin*, this Court ruled that its traditional, exacting standard for overcoming the presumption in favor of concurrent jurisdiction could not be satisfied by "the Clayton analogy" alone. 493 U.S. at 459-63.

Here, in contrast, reliance on the antitrust analogy is particularly fitting: the availability of private injunctive relief under RICO hinges on the meaning of text in Section 1964(c) that is in every material respect identical to the Clayton and Sherman Act provisions from which it was drawn. See *Holmes* v. *SIPC*,

503 U.S. 258, 268 (1992).[15]

2. *Other Arguments Based on RICO's Text and Structure.* Respondents seek to overcome the inference based on the antitrust models by contending (at 37) that Section 1964(a) "unambiguously" confers on district courts broad equitable jurisdiction. But that hardly answers the critical question of *who* may properly invoke the district court's equitable powers. That question is answered by 18 U.S.C. § 1964(b) (emphasis added): "*The Attorney General* may institute *proceedings under this section.*" Contrary to respondents' suggestion, Section 1964(b)'s unqualified authorization of actions by the government – which respondents quote only selectively (Resp. Br. 38) – is simply *not* equivalent to Section 1964(c)'s far more limited authorization of private litigants who can demonstrate an "injur[y]" to their "business or property" to "sue therefor" and recover the specified remedies of treble damages and costs.

Next, respondents emphasize that Section 1964 nowhere expressly "precludes injunctive relief to private parties." Br. 37; see also *id.* at 39. But this Court has never imposed such an onerous and absurd drafting obligation on Congress, nor should it here. In fact, this Court *rejected* this very argument in interpreting the language of the Sherman Act on which civil RICO was modeled. See U.S. Br. 10-11 & n.5. *In D.R. Wilder Mfg. Co.*, the Court acknowledged that "there are no words of express exclusion" in the Sherman Act barring individuals from "act[ing] in the enforcement of the statute," but concluded that "such exclusion must be implied * * * because of the familiar doctrine that where a statute * * * gives a new right and declares the remedy, the * * * remedy can be only that which the statute prescribes." 236 U.S. at 174-75 (internal quotations omitted). The Court reaffirmed that principle in *Paine Lumber*. See 244 U.S. at 470-71.

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[15] We did not "concede that private injunctions were available" in our "1993 brief to this Court." Resp. Br. 44 n.55. All we said is that the "civil remedies" provided under Section 1964 "include injunctions." That is beyond dispute: Section 1964 authorizes *the government* to seek injunctive relief.

Finally, respondents assert that Congress "combined the language" from "§ 4, * * * § 15, * * * *and § 16*" of the Clayton Act "into a single section, § 1964." Resp. Br. 43 n.54 (emphasis added). But there is no trace in Section 1964 of the "language" of Section 16 (which *expressly authorizes* private injunctive relief under the Clayton Act). Congress rejected repeated proposals to add a provision like Section 16 to civil RICO. See 01-1118 Pet. Br. 38, 41, 45-47.

3. *The Legislative History.* Multiple proposals were presented to both the House and the Senate – during RICO's consideration and in succeeding Congresses – that would have expressly authorized private injunctive relief. See 01-1118 Pet. Br. 45-48; 01-1119 Pet. Br. 15-18 & n.16; U.S. Br. 12-13. Respondents take issue with the idea that Congress "rejected" these proposals. While it is true that (except for the Senate's vote in 1972) the House and Senate never took formal votes on these proposed amendments, it cannot be disputed that the option of authorizing private injunctive relief was presented again and again in House and Senate committees as well as on the floor, and that both chambers ultimately chose a competing alternative. 01-1118 Pet. Br. 45-46. Under this Court's cases, that is significant. *Id.* at 48 (citing cases).

Respondents also dispute the significance of our showing that Section 1964(c) was "a branch grafted onto the already-completed trunk of the statute." *In re Fredeman Litig.*, 843 F.2d 821, 829 (5th Cir. 1988). But we are not suggesting that Section 1964(c) must "be read in a vacuum, as if § 1964(a) were not part of the statute." Resp. Br. 46. What we *are* saying is that Section 1964(c)'s origin as an add-on provision refutes the Seventh Circuit's premise that Section 1964(c) bears exactly the same relationship to Section 1964(a) as does Section 1964(b). See 01-1118 Pet. Br. 43-44. That flawed premise also disregards the fact that subsections (a) and (b) originated in a single provision of the Sherman and Clayton Acts.

4. *The Liberal Construction Clause and Inherent Powers.* According to respondents (at 40-41), this Court in *Reves* v. *Ernst & Young*, 507 U.S. 170 (1993), pointed to RICO's liberal

construction clause and underscored "the importance of broadly construing RICO's remedies section." Like the Seventh Circuit (01-1118 Pet. App. 10a), however, respondents selectively quote from *Reves*, which *rejected* an argument based on the clause. Respondents also omit this Court's statement that the "purposes Congress had in mind * * * must be gleaned from [RICO] through *the normal means of interpretation*." 507 U.S. at 183-84 (emphasis added); see also *Holmes*, 503 U.S. at 274.[16]

Equally meritless is respondents' invocation (Br. 38-39) of federal courts' "inherent powers" as a reason to disregard the strong evidence that Congress never intended to authorize private injunctive relief. The principle underlying *Bell* v. *Hood*, 327 U.S. 678 (1946), is limited to *compensatory* relief for plaintiffs who otherwise would be left without any remedy. See *Barnes* v. *Gorman*, 122 S. Ct. 2097, 2130 (2002).[17] Nor is *Franklin* v. *Gwinnett County*, 503 U.S. 60 (1992), of help to respondents. *Franklin*, like *Bell*, deals with remedial questions in the context of a right of action that has been *implied* by the judiciary (and in any event it authorizes judicial recognition of "appropriate" remedies only, see 503 U.S. at 73). In RICO, by contrast, Congress has (1) expressly created a private right of action under Section 1964(c); (2) specified the remedies that are available in such an action; and (3) authorized the government

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[16] In addition to *Reves*, respondents cite six of this Court's cases in support of their argument based on the liberal construction clause. Br. 40 & n.52. But only two of those cases even mention the liberal construction clause – and neither supports respondents' position. In *United States* v. *Turkette*, 452 U.S. 576, 587 (1981), the Court stated that it would have reached the same conclusion "[w]ith or without" the clause. And in *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985), the Court cited the clause only after it had determined that there was "no room in the statutory language for an additional, amorphous 'racketeering injury' requirement." *Id.* at 495.

[17] Respondents attempt (Br. 39-40 n.51) to distinguish *Alexander* v. *Sandoval*, 532 U.S. 275 (2001), on the ground that it involved the "right to sue," not remedial issues. The argument overlooks this Court's teaching that the "statutory structure" is "pertinent not only to the scope of the implied right, but also to the scope of the available remedies." *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284 (1998).

to institute other proceedings in which different remedies are available. See *Lane* v. *Peña*, 518 U.S. 187, 197 (1996) (presence of express remedies provision "brings this case outside the 'general rule' * * * discussed in *Franklin*").

Lastly, there is no merit to respondents' reliance (at 38-39) on the "historic equitable" powers of the federal courts. Those background principles did not carry the day in construing the Sherman Act's remedies (see pages 15-16, *supra*), or in *Grupo Mexicano*, and they should not here either. Moreover, this case is readily distinguishable from *Califano* v. *Yamasaki*, 442 U.S. 682 (1979), which turned on the complete absence of any evidence in "either the [statutory] language or the legislative history" of an intent on Congress's part to preclude injunctive relief. And cases such as *Califano* are fundamentally different because they involved arguments that particular statutory provisions categorically barred the federal courts from exercising their traditional equitable authority. But Congress has not precluded the federal courts from exercising their equitable powers in all civil RICO cases; it has simply insisted that these powers be invoked by the federal government only.

* * * * *

As respondents have candidly admitted (Br. in Opp. 15), the Court's resolution of this case will not materially diminish the statutory protections available in the future to abortion clinics or their patients. The FACE Act, 18 U.S.C. § 248, forbids the actual or attempted interference, through "threat of force or by physical obstruction," with "any person because that person is or has been * * * obtaining or providing reproductive health services." *Id.* § 248(a)(1). It not only imposes criminal penalties (although less severe ones than the Hobbs Act) but also authorizes private civil actions for compensatory and punitive damages and for "temporary, preliminary, or permanent injunctive relief." *Id.* § 248(c)(1)(B). The FACE Act, in short, is everything RICO and the Hobbs Act are not.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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OCTOBER 2002